Supreme Court, U.S.
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94 838 NOV 9 1994

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No. 94-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RENATO TORRES

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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26 pp

QUESTION PRESENTED

1. Whether the Seventh Circuit Court of Appeals erred in ruling that Petitioner was never placed in jeopardy in the prior drug asset forfeiture proceedings because he allegedly did not establish that he was an owner of the property seized and forfeited as a result of his arrest and therefore, the subsequent criminal case did not violate the Fifth Amendment prohibition against double jeopardy by having first punished Petitioner in the forfeiture proceedings and then once again in the subsequent criminal proceedings.

PARTIES

The parties named in the caption are the only parties to this action.

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No. 94-

In The

Supreme Court of the United States

October Term, 1994

RENATO TORRES

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner hereby requests that this Court issue a writ of certiori to review a judgment of the United States Court of Appeals for the Seventh Circuit entered July 11, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, which is reported at 28 F.3d 1463 (7th Cir. 1994), is reprinted as Appendix A, pp. A1-6 of this petition.

JURISDICTION

The judgment of the Court of Appeals For The Seventh Circuit was entered July 11, 1994.

A petition for rehearing en banc was denied on July 26, 1994.

An extension of time to file this petition for certiori was given until November 9, 1994 and this petition is therefore timely filed.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTE INVOLVED

The .statute involved in this petition is 21 U.S.C. §881 (a)(4) (a)(6) and (a)(7), the pertinent provisions are set forth in the appendix, pgs. A-7 through A-11.

STATEMENT OF THE CASE

Introduction

This case involves a conflict among the circuits with regard to the Fifth Amendment right of an individual against multiple punishments when an asset forfeiture first occurs and then a subsequent separate criminal penalty is imposed. In the decision from which Petitioner seeks a writ of certiori, the Seventh Circuit, contrary to at least the Ninth Circuit, has held that since the defendant was not an "owner" of the assets forfeited, jeopardy never attached to him in the asset forfeiture case so that the subsequent conviction in the criminal case was not barred by double jeopardy.[1]

THE DISTRICT COURT CASE

Petitioner, Renato Torres, entered a plea of guilty to conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §846. Shortly thereafter, while he was awaiting sentencing, Renato Torres, filed a motion with the District Court seeking to stay his sentence and discharge him from custody based on this Court's holding in Austin v. United States, 509 U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). Petitioner alleged that the previous forfeiture of $60,000.00 seized upon his arrest was "punishment" and

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[1]In United States v. 1982 24' Sanger Boat, 738 F.2d 1043 (9th Cir. 1984), the Ninth Circuit concluded that it is erroneous to conclude that only the owner of property may be a claimant.

any subsequent penalty imposed in the criminal action would violate the Fifth Amendment prohibition against successive punishments. The District Court denied Petitioner's motion and sentenced him to seventy-three months in the custody of the United States Attorney General and assessed a fine of ten thousand dollars ($10,000.00). The Court also recommended that Renato Torres be deported at the completion of his sentence.

THE SEVENTH CIRCUIT APPEAL

Renato Torres appealed the decision of the District Court arguing that the prior jeopardy clause of the Fifth Amendment of the United States Constitution provides for three separate protections; (1) against reprosecution after acquittal; (2) against reprosecution after a conviction; and (3) against being punished twice for the same act. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Seventh Circuit first acknowledged that Austin v. United States, 509 U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and United States v. Halper, 490 U.S. 435 (1989) recognized that forfeiture and civil fines can indeed be penalties for crimes. The Court also acknowledged the recent decision in Montana Dept. of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994) that a tax imposed only on persons arrested for drug offenses can indeed count as a separate jeopardy. In fact, the Court stated:

> "Suppose the civil forfeiture gets to trial first. The United States will try to show that the money was used in an illegal drug transaction. 21 U.S.C. §881(a)(6). At the beginning of the hearing, when evidence is first presented to the trier of fact in a proceeding seeking to impose a penalty for crime, jeopardy "attaches." See, Crist v. Bretz, 437 U.S. 28, 32-36 (1978). At the end of the proceeding, the trier of fact makes appropriate findings and either forfeits the property or concludes that the claimant didn't do it or has some statutory defense. Come the criminal trial, the accused can plead former jeopardy-former conviction (and punishment) on the one hand, former acquittal on the other." p. A3.

The Court went on, however, to conclude that Renato Torres was not a "party" to the forfeiture action because he did not file a claim in the forfeiture action. The Court stated: "Indeed, because Torres did not make a claim in the forfeiture proceeding, we have no reason to believe that he owned or had any interest in the money." p. A4 In effect, the Seventh Circuit found that Renato Torres was never "in jeopardy" in the forfeiture proceedings, therefore there could not be double jeopardy in the subsequent criminal case.

REASONS FOR ALLOWING THE WRIT

Introduction

The Seventh Circuit opinion in this case should be reviewed on a writ of certiori by this Court because it is in direct conflict with the Ninth Circuit and because it is based on a faulty interpretation and application of forfeiture law. Although the Seventh Circuit agreed with the substance and analysis set forth by Petitioner, i.e. that a previous forfeiture of assets is a punishment for purposes of double jeopardy so as to bar a subsequent criminal trial, the Seventh Circuit carved out an unprecedented exception and found that jeopardy did not ever attach to Petitioner because he did not first file a claim in the forfeiture action.

The Writ of Certiori Should Be Allowed To Resolve A Direct Conflict Among the Circuits

The Seventh Circuit has strained the interpretation of who is a claimant in a forfeiture case. In United States v. 1982 24' Sanger Boat, 738 F.2d 1043 (9th Cir. 1984), the trial court concluded that because claimants had failed to allege ownership of property, they lacked standing to be a claimant. In reversing the trial court's decision, the Ninth Circuit concluded that it was erroneous to conclude that only the owner of property may be a claimant. Id. at 1046. All that is needed is a possessory interest and a party can be a claimant. In United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) in United States Currency, 558 F.2d 1359, 1360 (9th Cir. 1977), it was determined that a claimant is one who

claims to own the merchandise or to have an interest therein. The United States Supreme Court has stated that under the Fourth Amendment, a seizure of property occurs, "when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). In United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency, 792 F.2d 1470 (9th Cir. 1986), the court noted that all that is required to assert a valid claim to a forfeiture is a possessory interest in the property seized.

Applying the logic of the aforementioned authority to the instant case, it becomes apparent that the Seventh Circuit's conclusion that petitioner, Renato Torres was not placed in jeopardy in the forfeiture case because he did not establish any ownership interest in the seized assets was made in error. All that Torres needed to establish was some possessory interest in the $60,000.00 seized from him. There was no dispute that Torres had at the very least, a possessory interest in the money seized which originally gave rise to the forfeiture case. This possessory interest was established by the seizure itself at the time of his arrest. The fact that Torres had not stated in the criminal case that he was the "funds' owner" is irrelevant to the inquiry of double jeopardy. Just as the parties in the aforecited cases "claimed" to have any interest in the seized property, so did Renato Torres have such a claim here.

Renato Torres has no objection with the analysis set forth by the Seventh Circuit concerning the applicability of the Fifth Amendment protections in a forfeiture proceeding. Indeed, the Seventh Circuit agreed with Petitioner that under Austin v. United States, 509 U.S. _____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and Montana Dept. of Revenue v. Kurth Ranch, _____ U.S. _____, 114 S.Ct. 1937 (1994), forfeiture and civil fines can be penalties for crimes involving the Fifth Amendment guarantees against double jeopardy. In light of the cases heretofore cited by the Ninth Circuit, it is clear that the Seventh Circuit was simply faced with the unpalatable choice of dismissing the criminal charges involving the distribution of cocaine thereby freeing Petitioner from prison or creating an exception avoiding the impact of Kurth Ranch and Austin. By making the latter choice, the Seventh Circuit attempted to emasculate the aforementioned precedent and did not do justice to the Petitioner. This Court should correct the error below and now grant this petition for certiori.

Since Torres has a possessory interest in the forfeited property originally seized from him, his loss by virtue of that forfeiture put him at risk in the forfeiture proceeding. That risk indeed placed him in jeopardy in the forfeiture case. Under the double jeopardy analysis set forth by the Seventh Circuit in the decision of July 11, 1994, and pursuant to the cited authority which does not require an ownership interest in property seized, petitioner, Renato Torres respectfully requests that this Court grant the petition for certiori.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Writ of Certiori.

Respectfully Submitted,

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Dated: November 7, 1994

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-3875

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RENATO TORRES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 CR 340—**Charles P. Kocoras**, *Judge.*

ARGUED JUNE 15, 1994—DECIDED JULY 11, 1994

Before ESCHBACH, EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Renato Torres and Carlos Olivares produced $60,000 to pay for three kilograms of cocaine. It was a trap. The "sellers" were federal agents; Torres and Olivares lost the money and their liberty. Torres pleaded guilty to drug offenses and was sentenced to 73 months' imprisonment. His sole argument on appeal is that, by virtue of the double jeopardy clause, the forfeiture of the $60,000 precludes the sentence of imprisonment.

We know from *Austin v. United States*, 113 S. Ct. 2801 (1993), and *United States v. Halper*, 490 U.S. 435 (1989), that forfeiture and civil fines can be penalties for crime,

and from *Halper* and *Montana Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), that a financial exaction (in *Kurth Ranch*, a tax imposed only on persons arrested for drug offenses) can count as a separate jeopardy. *Austin* involved 21 U.S.C. §881, the same statute invoked to forfeit the $60,000. Torres asks us to put these opinions together and hold that the forfeiture, which occurred first, is a former jeopardy barring the sentence of imprisonment.

If the prosecutor had sought both forfeiture and imprisonment via the same indictment, Torres's argument would be a non-starter. For the double jeopardy clause does not bar cumulative punishments imposed in a single proceeding—whether these punishments be the ordinary combination of prison plus a fine, or consecutive terms in prison, or prison plus a forfeiture. *Ohio v. Johnson*, 467 U.S. 493, 500 (1984); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981); *Whalen v. United States*, 445 U.S. 684, 693 (1980); *United States v. Masters*, 978 F.2d 281, 285 (7th Cir. 1992). But the prosecutor did not seek both prison and forfeiture in a single indictment, which would have ensured that there would be a single trial (and hence only one jeopardy). See Fed. R. Crim. P. 7(c)(2), 31(e), 32(b)(2). Instead the United States commenced separate criminal and administrative proceedings, one seeking imprisonment (plus a fine) and the other seeking forfeiture. With the benefit of *Austin* and *Kurth Ranch*, both of which were decided after this prosecution began, the prosecutor doubtless can see the hazards of such an approach. The United States would do well to seek imprisonment, fines, and forfeiture in one proceeding.† When choosing between civil and criminal

† Forfeiture usually is an *in rem* proceeding, and other persons may have had claims to the money. The United States could not have larded into the criminal proceeding against Torres the resolution of all claims to the $60,000. But it could have sought in the criminal indictment to forfeit Torres's interest, if any, in the $60,000, using the administrative forfeiture proceeding to entertain and resolve other claims to the cash.

forfeitures, the prosecutor will have to recall that after *Halper*, *Austin*, and *Kurth Ranch* the nomenclature "civil" does not carry much weight. We must consider whether, by beginning separate, but parallel, proceedings, the prosecutor has freed Torres from imprisonment.

Writing before *Kurth Ranch*, two courts of appeals answered in the negative on the ground that parallel civil and criminal proceedings are really a single action, distinct only because "[c]ivil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately." *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993); see also *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994). There is force to this in the sense that the civil and criminal actions may be coordinated, holding down expense and travail. But if as *Kurth Ranch* holds a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy," it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema.

Suppose the civil forfeiture gets to trial first. The United States will try to show that the money was used in an illegal drug transaction. 21 U.S.C. §881(a)(6). At the beginning of the hearing, when evidence is first presented to the trier of fact in a proceeding seeking to impose a penalty for crime, jeopardy "attaches." See *Crist v. Bretz*, 437 U.S. 28, 32-36 (1978). At the end of the proceeding, the trier of fact makes appropriate findings and either forfeits the property or concludes that the claimant didn't do it or has some statutory defense. Come the criminal trial, the accused can plead former jeopardy—former conviction (and punishment) on the one hand, former acquittal on the other. The point of *Johnson*, *Hunter*, and *Albernaz* is that cumulative punishments imposed at the end of a single trial do not violate a constitutional rule limiting the number of times the accused may be put to his defense for the same crime. Separate administrative and criminal proceedings can lead to two trials, each of which produces

a punishment for a single offense. Two trials, even if close in time, are still double jeopardy. This would be clear enough if the United States put Torres on trial, convicted him of attempting to buy the cocaine, and sentenced him to 37 months' imprisonment, then the next day held a second trial for the same offense and tacked on another 36 months, for a total of 73. Although 73 months would have been a lawful punishment after a single trial, Torres would have had an invulnerable defense of former jeopardy at trial No. 2. In *Kurth Ranch* itself the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered. 114 S. Ct. at 1947 n.21 (remarking that the case "involves separate sanctions imposed in *successive* proceedings") (emphasis in original).

This case shows, however, that parallel administrative and criminal actions do not *necessarily* violate the double jeopardy clause. Torres received notice inviting him to make a claim in the civil forfeiture proceeding. He did not. As a result, he did not become a party to the forfeiture. There was no trial; the $60,000 was forfeited without opposition, and jeopardy did not attach. You can't have double jeopardy without a former jeopardy. *Serfass v. United States*, 420 U.S. 377, 389 (1975). As a non-party, Torres was not at risk in the forfeiture proceeding, and "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-92. Torres was no more "in jeopardy" in a forfeiture proceeding in which he was not a party than he would have been in a separate trial of Olivares—a trial in which Torres might have been a witness and that could have ended with a finding by the judge that Torres and Olivares sought to buy cocaine, just as the indictment charged.

Indeed, because Torres did not make a claim in the forfeiture proceeding, we have no reason to believe that he owned or had any interest in the money. Even in the criminal proceeding, he has not said that he was the funds' owner. Perhaps he was just a courier, making the buy

on behalf of an undisclosed principal. If Torres lacked an interest in the cash, its forfeiture did not impose any penalty on *him*, and again the argument derived from *Kurth Ranch* fails. A non-"penalty" imposed in a civil proceeding does not amount to "jeopardy of life or limb" within the meaning of the fifth amendment. Torres is not entitled to escape time in prison just because the forfeiture may have penalized one of his confederates in crime, even his best friend.

AFFIRMED

RIPPLE, *Circuit Judge*, concurring. I agree that, because Mr. Torres did not make a claim in the civil forfeiture proceeding, he did not become a party to that proceeding and therefore could not have been placed in jeopardy. Therefore, I agree that the judgment ought to be affirmed on that ground.

The ink is hardly dry on the Supreme Court's decision in *Montana Department of Revenue v. Kurth Ranch*, 62 U.S.L.W. 4429 (U.S. June 6, 1994), and the government has not yet had the opportunity to brief fully its applicability to the federal civil forfeiture provisions. Upon reviewing the pre-*Kurth Ranch* decisions of the other circuits, *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), and *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994), I believe that the preferable course is to refrain from expressing an opinion on their continued vitality until we have the assistance of counsel and perhaps further guidance from the Supreme Court. With this reservation, I am pleased to join the judgment and the opinion of the court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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§881 Forfeitures

(a) Property Subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property dscribed in paragraph (1), (2), or (9), except that:

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions o this section unless it shall appear tha the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner whle such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All monys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable insturments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or inended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property descibed in paragraph (1) or (2) and any proceeds traceable to such property.

* * * * *